JD(SF)—26—06
Livingston, California

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

FOSTER POULTRY FARMS
The Respondent

and **Case 32-CA-22292-1**

LEAGUE OF INDEPENDENT WORKERS
OF THE SAN JOAQUIN VALLEY, LOCAL LODGE 2005
affiliated with the INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE WORKERS,
DISTRICT LODGE 190, AFL-CIO
The Charging Party

Amy L. Berbower, Esq., of Oakland, California,
for the General Counsel.

Caren P. Sencer and *David Rosenfeld, Esqs.*
of Weinberg, Roger & Rosenfeld, PC
of Alameda, California, for the Charging Party.

Steven R. Feldstein, Esq., of Menlo Park, California
and *Scott T. Earl, Esq.*, of New York, New York
of *Heller, Ehrman, White & McAuliffe, LLP*
for the Respondent.

DECISION

Statement of the Case

CLIFFORD H. ANDERSON, Administrative Law Judge: I heard the above-captioned case in trial in Oakland, California on March 28 and 29, 2006, pursuant to a complaint and notice of hearing issued by the Regional Director of Region 32 of the National Labor Relations Board on January 9, 2006. The complaint is based on a charge filed by the League of Independent Workers of the San Joaquin Valley, Local Lodge 2005 affiliated with International Association of Machinists and Aerospace Workers, District Lodge 190, AFL-CIO[1] (the Charging Party or the Union and sometimes Local Lodge 2005) against Foster Poultry Farms (the Respondent) on October 4, 2005, and docketed as Case 32-CA-22292. The charge was subsequently amended on November 2 and December 28, 2005. The Respondent filed a timely answer to the complaint and amended its answer at the hearing.

[1] The post-affiliation name of the Charging Party was variously referred to in the record. Since the record, including Form LM-1 and affiliation agreement, establishes its status as an affiliated Local Lodge that nomenclature is used. As noted later in the decision in greater detail, the designating number of the entity became 2005 which is also used herein.

The complaint, as amended at the hearing, alleges, and the answer denies, inter alia, that the Respondent on and after about September 30, 2005, withdrew recognition from the Union as the exclusive collective-bargaining representative of a unit its employees and as part of that withdrawal of recognition, failed and refused to meet and bargain or provide the Union with a current list of the names and addresses of current unit employees. The complaint alleges that the Respondent in so refusing violated its obligation to bargain in good faith and thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). The Respondent does not contest its refusals but rather contends that it had no obligation to recognize or bargain with the Union at relevant times because the Union during that period was not the legitimate representative of its employees.

Findings of Fact

Upon the entire record herein, including briefs from the Respondent and the General Counsel and oral argument by the Charging Party,[2] I make the following findings of fact.[3]

I. Jurisdiction

The Respondent, a California corporation with offices and places of business in Turlock and Livingston, California, has at all times material been engaged in the processing and sale of poultry products. During the past 12 months, the Respondent, in the course and conduct of its business operations, sold and shipped goods valued in excess of $50,000 from its California facilities directly to customers located outside the State.

Based on the above, there is no dispute and I find the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organizations

The record establishes, there is no dispute, and I find the following organizations and each of them, during the designated periods were labor organizations within the meaning of Section 2(5) of the Act:

- The League of Independent Workers of the San Joaquin Valley, Local 2004 (sometimes Local 2004), prior to its affiliation with the International Association of Machinists and Aerospace Workers, District Lodge 190, AFL-CIO,
- The League of Independent Workers of the San Joaquin Valley, Local Lodge 2005 affiliated with the International Association of Machinists and Aerospace Workers, District Lodge 190, AFL-CIO at all times since September 11, 2005,
- The International Association of Machinists and Aerospace Workers, District Lodge 190, AFL-CIO (sometimes the District Lodge), at all times material, and

[2] The Charging Party also filed a joinder adopting the post-hearing brief submitted by the General Counsel.

[3] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

- The International Association of Machinists and Aerospace Workers, AFL-CIO (sometimes the International, the IAM or the Machinists), at all times material.

III. The Alleged Unfair Labor Practices

A. Background

1. The Bargaining Unit

At all material times the Respondent has employed employees in the following unit of employees (the unit):

> All full-time and regular part-time employees employed by the Respondent at its 900 Davis Street, Livingston, California facility including maintenance, production, and evisceration employees, rendering department employees, deli plant employees, and Northern California Distribution Center (NCDC) employees; Northern Complex Hive Haul employees located at 8301 Sycamore Avenue, Livingston, California, including catchers/forklift drivers, truck drivers and welders, excluding all outside sanitation employees, quality control employees, truck stop mechanics, clerical employees, Southern Complex Live Haul employees, guards and supervisors as defined in the Act.

There is no dispute and I find that at all times material the unit has been and is now appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act. At relevant times there were approximately 2300-2400 employees in the unit.

2. The Labor Organizations Involved

As will be discussed further, infra, the League of Independent Workers of the San Joaquin Valley, Local 2004, was a relatively informal organization created to represent the unit in 2004. It was not affiliated with any other labor organizations nor represented any other employees. Its staff comprised a single, essentially full-time unpaid individual assisted by a few unpaid non-employee officers and staff and employee officers and committee members and other employee volunteers. It never entered into a collective-bargaining agreement and it never established or collected mandatory membership dues. It generally dealt with unit employees without distinction based on membership in Local 2004 and operated on the proverbial shoestring entirely on voluntary contributions and donated items.

The International Association of Machinists, AFL-CIO, is an international labor organization. It maintains organizational sub-units entitled District Lodges which in turn contain Local Lodges. The Local Lodges are in most cases the entities that are certified to represent employees in collective bargaining.[4]

District Lodge 190, like other District Lodges of the International, has constituent Local Lodges, which it supports. While the District Lodge primarily represents traditional mechanically skilled employees, it also represents employees in other industries including at least one unit within the food processing industry.

As will be discussed further, infra, the League of Independent Workers of the San Joaquin Valley, Local Lodge 2005, affiliated with the International Association of Machinists and

[4] *California Saw and Knife Works*, 320 NLRB 224, 230 (1995).

Aerospace Workers, District Lodge 190, AFL-CIO, was the name taken by Local 2004 upon affiliation with the International and District Lodge when it was determined that a Local Lodge 2004 already existed within the Machinists Local Lodge structure.

B. Events[5]

1. Pre-Affiliation Events

The unit had been represented by a separate, unrelated labor organization which was decertified in Case 32-RD-1411 on October 14, 2003. In mid 2004, Local 2004 came into being and on September 23, 2004, filed a petition in Case 32-RC-5286 seeking to represent the unit. Following an NLRB election the Union was certified on November 14, 2004 as the exclusive representative of unit employees.

Local 2004 commenced bargaining with the Respondent respecting the unit in December 2004. The President of Local 2004, Mr. Ralph Meraz, was the chief negotiator assisted by a negotiating committee of 14 which comprised two non-employee Local 2004 officials and 12 employee committee members. The two entities bargained over a dozen sessions. Negotiations ended on May 9, 2005 with no agreement being reached.

2. Affiliation Events

President Meraz and others with Local 2004 apparently concluded following the end of negotiations that Local 2004 needed the assistance of more experienced trade union personnel and considered the question of affiliating Local 2004 with another labor organization. By August 2005 the matter became the subject of a Local 2004 meeting.

Local 2004 held regular membership meetings open to all unit employees and their families. In practice, all who attended were welcome. Meetings were regularly held on Sundays in the same local hall – the only building large enough to accommodate the attendees. Commonly a first meeting at 1:00 p.m. was scheduled for English and Punjabi speakers, followed by a 2:00 p.m. meeting for Spanish and Portuguese speakers. The meetings were announced by distribution of handbills at the plant entrances several days ahead of the meetings. Mr. Meraz testified:

> We normally start on the night shift and go through the people coming into work on night shift, and then we return in the morning and do the morning shift when they come in.
> Q And is it one person, more than one person?
> A No, there's several people, sometimes ten, sometimes six, an average of about six people. We cover two gates, so we have three or four people on each gate.
> Q And are they there for the entire duration of the shift?
> A No, they're there for the entire duration of when people come to work, so they're there for two and a half hours, three hours.

The handbills were commonly printed in both English and Spanish and also bore a handwritten Punjabi translation.

[5] The great bulk of the factual recitation herein was taken from the testimony of Mr. Ralph Meraz. Only Messrs. Meraz and District Lodge Directing Business Representative James Beno testified. The Respondent did not call any witnesses.

On August 10, 2005, a handbill announcing an "Important meeting" to discuss the "pros and cons" of affiliating with an international union was printed and distributed in the normal manner announcing a meeting would be held on August 14. Some 1400 copies of the 3 language handbill were distributed. The handbill announced the normal two meeting schedule for different language speakers.

Mr. Meraz testified that normally the earlier meeting for English and Punjabi speakers was less well attended with perhaps 150-300 people comprising a typical range of attendance. The later Spanish and Portuguese speaker meeting was significantly larger with a typical attendance of approximately 800 people. As was the Union's practice at that time, attendance was not taken, no sign-in sheet was maintained, nor was a systematic count of individuals present in the hall taken. Mr. Meraz testified that estimates respecting attendance were fairly accurate, however, given that the number of chairs in the hall were known and provided a reference point with which total attendance could be estimated.

On August 14, 2005, the two meetings were held as announced. Mr. Meraz spoke at each meeting. In the first he had the assistance of a Punjabi interpreter. In the second meeting the attendees were asked if there were any who spoke or understood only Portuguese. When none so indicated, the meeting was conducted in Spanish. Mr. Meraz testified to his presentation at each meeting:

> I told people that we had a problem and we had to resolve it. That we were in a point in time that we were not moving forward or backwards, and basically told them that the company was insisting on the fact that we were new and they were going to make all the changes they could make, and in talking to them they told me that if we weren't an established unit, then they would not take that approach. I also knew that there were some people that prefer a different union, and so basically what I said, what we need to do is actually join someone that has more expertise than we do for backing, and become part of that entity for the background that we need, for the support, for the expertise, for the information to move it forward. So, I wanted to break some of the questions that the company had and resolve some of the issues that employees had with us as a lead. And that was that they also wanted a bigger unit that to them was stronger than we were. And some of the people wanted some other unions for other reasons.
>
> So, basically I felt that if we selected, if we became part of a bigger entity, that would resolve the problem with our employees who wanted someone bigger and stronger. . . . I proposed that they allow me to seek an affiliation and to talk to different, other people that we could belong to, other unions, relying on the size and the expertise and that sort of thing, I just wanted their permission to seek an affiliation.
> . . .
> I told them the majority governed and I just needed a show of hands to see if we wanted to pursue, if I could have permission to pursue an affiliation with someone else. And it was overwhelmingly approved.
> . . .
> Once I got approval, I told them that I would take about 30 days and we would have another meeting, it would give me time to speak to different organizations, and make some recommendations to them at the following meeting.

Mr. Meraz testified that the membership generally expressed concerns that Local 2004 retain its leadership, its name and as much of its autonomy as possible in any affiliation and that he assured the attendees that was also his goal.

Following the August 14, 2005 meetings, President Meraz and committee members contacted four labor organizations and asked various questions relevant to affiliation. One of the four was the District Lodge and Mr. Meraz, initially alone and subsequently with other Local 2004 committeemen in later meetings, met with Mr. James Beno, the Directing Business Representative of the District Lodge, and members of his staff.

The other labor organizations contacted, in Meraz's view, presented less favorable alternatives or were unable to represent the bargaining unit because of "no-raiding" agreements between and among affiliated international unions. The District Lodge through Directing Business Representative Beno and his staff convinced Meraz and the Local 2004's committeemen that it was a desirable labor organization with which to affiliate.

Local 2004 prepared a handbill dated August 29, 2005, some 1400 copies or so of which were distributed at the plant in the manner described supra. The handbill, in English, Spanish and Punjabi, was printed on Local 2004's letterhead and titled: "Affiliation Up-Date." It stated in part:

> We have selected the Machinist Union for affiliation and we will complete all legal requirements in the next few days. All of you will have an opportunity to vote on this recommendation at a general meeting scheduled for this purpose. Make your voice known, attend and vote!

In negotiating the "legal requirements of affiliation" the District Lodge and Local 2004 were aware of the Act's requirements of due process in voting and continuity of representation between the pre- and post- affiliation union. Indeed the parties possessed and Mr. Meraz testified he "followed" what appears to be a four-page legal memorandum on the subject, prepared at the International level which, was set forth in substantial detail specific steps to be taken to consummate an effective affiliation that carried the representational rights of the affiliating union along with it in its affiliation with the Machinists. That document emphasized that the labor organization affiliating with the Machinists should preserve the autonomy of the affiliating organization: "What seems to be most important for the purposes of this prong is that the day-to-day face of the union for employees does not change radically and that the employees' autonomy is not eliminated." The documents emphasized that local officers should be maintained, local governance should be maintained and in the adjustment of dues structures a transition period was "helpful".

At the conclusion of the negotiation process, the final draft of an "Affiliation Agreement" negotiated by the parties was prepared by the District Lodge and was signed, in the period before September 11, 2005, by the President and Secretary-Treasurer of the International and the President and the Secretary-Treasurer and Directing Business Representative of District Lodge 190.

Approximately 1900 copies of a notice dated September 1, 2005, drafted in English, Spanish and Punjabi, were distributed at the plant in the manner described supra. The notice, on Local 2004 letterhead, stated:

> **Affiliation Agreement Reached**
> September 1, 2005
>
> We wish to inform you that we have reached a tentative agreement of affiliation with the International Association of Machinists and Aerospace Workers. We have scheduled a

meeting for purpose of discussion and conducting a secret ballot on the proposed affiliation. An explanation of the terms of the affiliation will be presented and you will have an opportunity to discuss and ask questions prior to any vote on the proposed action.

You will be required to bring your Foster Farms I.D. Badge to receive your ballot; we will be using an election register. The meeting will take place at the Livingston Portuguese Hall September 11, 2005 at 1:00 pm English/Punjabi and at 2:00 pm Spanish/Portuguese [6]**. Your vote is your voice, make it count, and please attend.** [bolding in original.]

On September 1, 2005, Local 2004 had printed and mailed to employees some 2000 postcards announcing the time and place of the September 11, 2005 meetings. The front of the postcards, in a bordered box in English and Spanish, bore the bolded notation**:**

Meeting to Vote on Affiliation
(I.D. Badge Required)

The employee address list utilized in this and all unit employee mailings was the address list provided to Local 2004 by the Respondent as part of the NLRB election procedures in Case 32-RC-5286 involving the November 14, 2004, election. The list had not been updated by the Union, other than by weeding out addresses from which the Union's earlier mailings have been returned as undeliverable. Mr. Meraz testified he had requested the Respondent provide an updated list of unit employee names and addresses on many occasions after certification. The Respondent's agents, while they never explicitly refused to provide such a list, without exception put off providing it to the Union and never in fact ever provided one.[7]

The September 11, 2005, meetings proceeded as scheduled. Attending were officials of both Local 2004 and the District Lodge. As customary, President Meraz led the meeting. No formal attendance was taken. No one was excluded. The first meeting was conducted in English with Punjabi interpretation. The second in Spanish after no one requested Portuguese interpretation. Copies of the affiliation document in Spanish and English were present at each meeting but were not distributed. Mr. Meraz testified that printing expenses were prohibitive so he had 100 copies printed in English and 100 in Spanish and told the employees that anyone who wished a copy could have one. He also told the employees that if his supply ran out, he would have to ask for funds to print more. In the event, the copies printed were sufficient to supply copies to all requesting employees.

At each meeting Meraz made a PowerPoint presentation covering the background precedent to considering affiliation as well as the process of choosing a union with which to affiliate and the terms of the affiliation agreement with the IAM. Questions were taken from the floor during the presentation. More unit employee questions were taken at each meetings conclusion. Mr. Meraz answered the bulk of the questions but Mr. Beno also participated in the question and answer process. Meraz summarized the questions presented at the end of his remarks:

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[6] In the English and Punjabi language portions the English/Punjabi 1:00 p.m. meeting was listed, in the Spanish language portion the Spanish/Portuguese 2:00 p.m. meeting was listed.

[7] The refusal was not alleged as an unfair labor practice and the evidence is not relevant to such a finding and was not considered for that purpose.

Q And can you tell us what kinds of questions those were, and what your response to the questions were?
A They had a number of questions concerning who was going to be in charge, it was their primary concern. Who is going to lead the League? How is it going to change? Are the people who are now negotiating, the negotiating committee, is it going to be intact? They wanted to know how it would change, basically. How it was going to affect them, the membership?
Q And what did you respond?
A I told them that I had gone through the agreement and, this was during and after this presentation, that in my opinion the affiliation was appropriate. There would be some changes in the way that we did things. For example, their dues structure was different, I explained that to them and how it's going to affect them, because it was important. I told them that our committee -- I had assurances that our committee, Board of Directors, negotiating committee, and coordinators, would all remain the same, there would be no change in that.

They wanted to know if they would be eligible for strike benefits. That was one of the questions that we did not answer as that point in time, because they asked me what are the changes that you see are going to happen? I said, well, right now what I see is that we are totally independent. I come to you and you -- and I make recommendations and decisions, I have to go to no one. Once we affiliate, I will have some rules and regulations that I have to follow. We will have to modify our constitution and bylaws to abide by or to coincide with, not to contradict, the bylaws of the District 190, as well as the constitution of the IAM.

Substantial discussion took place respecting dues, strike benefits and transition changes.

Meraz also discussed the balloting in the meeting and showed a ballot:

I showed it to people, actually I had a sheet of paper that I showed them and basically I told them that it was sent in four languages, it was in English, Portuguese, Spanish and Punjabi, and it basically just said yes and no. Yes, if they accept it, and no if they didn't. I told them, as my presentation went on, that we would require IDs to check them off, and not to leave without voting.

The voting took place at the end of each of the two meetings. Following essentially NLRB election procedures familiar to many because of recent Board elections in the unit, unit employees were directed to a separate voting area. There they showed their employer-prepared photo identification to the election assistants who compared the potential voter's name to the names on the election eligibility list earlier discussed and, if the individual was on the list, a ballot was issued and the individual voted secretly in one of the provided voting booths and placed the marked ballot in a ballot box. Each election period was continued until there were no more voters. There were no individuals denied the opportunity to vote through late attendance in either balloting period. The voting procedures provided for a challenge vote process in the event individuals did not have employee identification or their names were not on the voter eligibility list. No such situation arose.

At the conclusion of the final balloting, the ballots were opened and counted in a large room with all interested parties allowed to observe the process. The final result was recorded on a tally of ballots. It noted: approximate number of eligible voters – 2100, number of void ballots – 4, number of votes cast for affiliation – 918, number of votes cast against affiliation – 21, challenged ballots – 0, total number of votes cast – 943.

Based on the vote and immediately after the count, Local 2004 formally entered into the affiliation agreement and became a Local Lodge of the District Lodge and the International.

3. Post-Affiliation Events

Following the affiliation on September 20, 2005, Mr. Beno, on District Lodge 190 letterhead, sent the Respondent's Vice President of Human Resources, Mr. Tim Walsh, a letter with the following text:

> This letter constitutes official notice that the League of Independent Workers of the San Joaquin Valley have formally affiliated with the International Association of Machinists and Aerospace Workers, District Lodge 190, AFL-CIO.
>
> The purpose of this letter is to formally request resumption of labor negotiations in an effort to reach agreement for a new collective bargaining agreement. Please advise my office of meeting dates you would have available in the near future.

Mr. Walsh responded by letter dated September 30, 2005. He stated:

> This letter is in response to your letter of September 20, 2005. We decline your offer to engage in labor negotiations because we do not believe that the affiliation of the League of Independent Workers of the San Joaquin Valley with the International Association of Machinists and Aerospace Workers, District Lodge 190, AFL-CIO was legally appropriate.

In late September and early October 2005, Mr. Meraz asked officials of the Respondent by telephone and e-mail for a current list of unit employee names and addresses. The Respondent's agent on October 10, 2005, told him by telephone that the Respondent would not provide the requested information because they did not recognize the affiliation of the League with the IAM and therefore did not feel obligated to recognize or bargain with it as the unit employees' representative.

At all times thereafter the Respondent has continued to fail and refuse to recognize the Union as the representative of its unit employees. The refusal includes a continuing refusal to meet and bargain with the Union concerning a collective-bargaining agreement for unit employees and includes a continuing refusal to provide an up-to-date list of the names and addresses of unit employees.

4. A Comparison of the Union Pre and Post Affiliation

The League of Independent Workers of the San Joaquin Valley was in essence founded as part of the organizational campaign that resulted in its 2004 Board certification as representative of the unit. At no time prior to the affiliation at issue herein was it associated with another organization. While there is no earlier written foundational document in evidence, the League has a substantial written constitution and bylaws adopted in May 2005 providing for various processes and decisions by vote of the membership including the mechanics of election of various officers. The constitution also has the following language as Article XVIII:

> Interim Government
>
> Since the League of Independent Workers is a newly formed organization and because the continuity of its current leadership is critical to the survival of this organization, and

the future of its members, the current leadership and founders of The League shall be the authorized interim government until such time an election of officers can be invoked in accordance with its Constitution which shall be not later than three (3) years after the ratification of the first collective bargaining agreement. This amendment will expire which such election is conducted and the duly elected members of the Executive Board are installed.

The entire life of the pre-affiliation Union was less than two years and at no time – to date – had a collective-bargaining agreement covering the only bargaining unit it represented been reached. The quoted "interim government" article's provisions have thus controlled the governance of the Union at all times after its initial adoption, both before and after the affiliation. Since the original officers in place at the time of the Union's 2004 formation were not elected, it appears there has never been a constitutionally required election and the original founding and unelected officials, save for turnover replacements, retain their positions

The constitution limits active membership eligibility to those employed within a represented bargaining unit. The Union has only represented the Respondent's unit employees, no other unit. Members were eligible to hold any elective office in the Union without any membership duration requirements. So, too, because no contract was ever reached, no dues structure was established under the constitution nor was dues collected. Indeed, it seems clear that no clear distinction was maintained or noted between unit employees who were members and who were not members in the Union. Rather the controlling status for participation in Union affairs at all pre-affiliation times was simply unit employment rather than formal acceptance into Union membership.

The constitution provides that membership dues will be established, increased or levied by vote of the membership. As discussed below, no dues structure was ever voted on or established, no dues as opposed to contributions were solicited and no dues in the since of mandatory payments were collected. Union revenue was not regular and was at best meager and episodic. Voluntary donations of money and materials were solicited from members and accepted. The staff without exception worked during the entire period without compensation. The Union office was austere – a trailer furnished with donated or borrowed furniture. A certain informality and austerity driven by necessity prevailed.

The IAM is a major international labor organization with a detailed constitutional structure which has been touched on supra. District Lodges, of which District Lodge 190 is but one, and Local Lodges, of which the post-affiliation Union is but one, fall within the regulatory framework of the International and in turn have their own detailed constitutions and by laws.

The League, in affiliating with the Machinists, did so in accordance with the terms of the affiliation agreement discussed at the meetings described earlier. That agreement was signed by officials of the Union, the District Lodge and the International President and Secretary-Treasurer. The agreement provided that the International would credit earlier Union membership as Machinist membership.[8] It also provided that the Union's constitution and bylaws must in time conform to the rules of the International and District Lodge but "reasonable time" was provided to accomplish such conformity. A dues structure of $25 was established for

[8] Since apparently the pre-affiliation Union did not formally require dues payments for membership, did not formally receive membership applications or accept individuals as members, issue membership cards or maintain a membership role, presumably membership would have constructively begun for all unit members at the time of Board certification or their beginning employment whichever was later.

the Union and per capita portions of those dues to be remitted to the International and District Lodge were to start in 2007 and to transition over a 10-year period rising to standard capitation rates. The agreement provided that all funds, assets and property under the control of the League would remain so. The District Lodge agreed to provide assistance and resources to the affiliated Local.

The Union at affiliation became a Local Lodge within District Lodge 190. While it had hoped to retain its local number 2004, that Local Lodge number already existed within the Machinists. Local Lodge 2005 was therefore selected and became the Union's official Local Lodge Number. This was not a merger with another local labor organization which put together two local level institutions and their governing officers and memberships into one single local level institution with merged officers and other governing structures. Rather, the League became a free-standing Local Lodge within the Machinists organizational structure all be it within the District Lodge and International's controlling structures.

Local Lodges must conform to the rules and requirements of the International's constitutional structure and the structure of the relevant District Lodge, District Lodge 190 here. But discretion exists within those governing structures to be flexible in preserving the existing arrangements of affiliating labor organizations. The International constitution at Article VI sets forth the duties of the International President, the second paragraph of which states:

> He/She shall have the authority, with the approval of the Executive Council[9], to approve mergers or consolidations of other labor organizations into the I. A. M. and to temporarily waive or alter such laws and policies of the I. A. M. as may be necessary to effectuate such mergers or consolidations.

This flexibility applied in a general sense, such as the agreement that the Union could keep its name: League of Independent Workers of the San Joaquin Valley as a portion of its title as a Local Lodge. It also applied in a transitional sense, such as the requirement of the Union that within a period of years the constitution and bylaws of the Union must be altered so as not to be incompatible with those of the Machinists.

The flexibilities discussed above make it difficult to compare the Union's pre-affiliation structure with its post- affiliation structure in any practical sense because the Union operated entirely under the "interim government" provisions of its constitution and has at all times since its affiliation to the time of the hearing been operating under the transitioning period under its post-affiliation relationship with the Machinists. The reality is that the Union came into being to represent the unit. Since it never negotiated a contract during the pre-affiliation period, its representation of unit employees was less institutionalized that it would have been had a contract been entered into and then administered by the Union. And, of course, the Union, post- affiliation, has not even been recognized by the Respondent as the representative of unit employees. In a real sense, the Union has not been able to function as a representing labor organization for some time and has never successfully negotiated nor administered a collective-bargaining agreement.

In terms of comparing the way the Union operated before and after affiliation in a practical sense, the officers and other representatives of the Union remain the same with the exception of turnover appointments. Meetings are conducted essentially as before. Things are

[9] Article V, Section 1 of the International Constitution defines the Executive Council as comprising the International President, General Secretary-Treasurer and the General Vice Presidents.

simply much the same. The Union offices are now less austere and larger commercial space has been leased and furnished with the trappings of commercial efficiency: officers, phones, computers, facsimile machine, copier, etc. The District Lodge has offered experienced hands at negotiating for assistance and participation in negotiations, but those negotiations have not occurred.

A dues structure was established in the affiliation agreement comparable to the amount levied by the labor organization that represented the unit before the Union with an extra dollar charged for additional member benefits. Mr. Meraz testified that he has an oral agreement with the District Lodge that the dues would not be required unless and until a contract is reached. Despite the fact that no contract has been reached, as of the time of the hearing, over 1000 members pay dues. While over a 10-year transition period the Machinists will command an escalating "per capita tax" portion of those dues, this fact will not in and of itself increase the membership dues.

C. Analysis and Conclusions

There is no dispute that the Respondent withdrew recognition from and ceased to bargain with the Union which conduct included the refusal to provide the Union was a current list of the names and addresses of unit employees. The Respondent defends this conduct by challenging the propriety of the Union's affiliation with the Machinists. Since that affiliation was invalid, argues the Respondent, it no longer had any obligation to recognize or bargain with the affiliated entity.

An employer obligated to recognize and bargain with a certified labor representative during the initial certification year may not withdraw recognition based on a claim the certified union has lost the support of unit employees. In an affiliation setting however, the bargaining obligation may be ended if the affiliation process does not meet the Board standards. The Board has long made it clear that an employer who withdraws recognition or ceases to bargain with an affiliated union under a claim that the affiliation is inappropriate bears the burden of proof in establishing such an assertion. *CPS Chemical Co*., 324 NLRB 1018 (1997). Thus the heart of the instant case is the sufficiency of the affiliation to preserve the Union's bargaining rights respecting the Respondent's employees in the bargaining unit.

Perhaps because the parties had earlier argued and briefed this case before the U.S. District Court in a proceeding under Section 10(j) of the Act,[10] the briefs submitted herein were particularly focused and scholarly on this issue. The basic law of bargaining representative continuity in an affiliation setting has two separate elements. The Board in *Hammond Publishers*, 286 NLRB 49, 50 (1987), restated traditional Board requirements:

> The Board has traditionally required that two conditions be met before it will grant a petition for the amendment of certification based on an affiliation or merger. First, the Board requires that the vote itself occur under circumstances satisfying minimum due process and, second, that there be substantial continuity between the pre- and post-affiliation bargaining representative.[8]

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[10] The District Court action and the April 28, 2006, decision in that proceeding, *Reichard v. Foster Poultry Farms*, 1:06-CV-0238 OWW-LJO (E.D, Cal) (April 28, 2006), are irrelevant to a determination of the merits in the instant matter. The Order in that proceeding however is relevant to issues of the remedy herein and was argued in that context by the parties.

[8] *Hamilton Tool Co*., 190 NLRB 571 (1971). In *NLRB v. Financial Institution Employees (Seattle-First National Bank*), 475 U.S. 192 (1986), the Supreme Court acknowledged the Board's traditional two-part test, but did not have to reach the question of whether both continuity of representation and due process must be satisfied in all affiliation cases. Id. at 199 fn. 6 and 209 fn. 13. In light of our finding below that both factors are met here, we find it unnecessary to address the issue.

The General Counsel during her opening statement and on brief announced that the government in this case was also arguing that current Board law regarding affiliation should be changed:

> Finally, I should note that while Board law currently requires an evaluation of both due process and continuity of representation, the General Counsel will be pursuing an alternative legal theory in this case...the argument being that so long as there is continuity between representation, an evaluation of the due process element is not necessary and is actually irrelevant.

It is appropriate to address each element of the traditional analysis and the General Counsel's argument that the law should be changed separately.

1. The Traditional Analysis

a. The Minimum Due Process Issue

The affirmation by represented employees and members of a labor organization's affiliation must be conducted with sufficient due process so that the result may be considered fair. The United States Supreme Court in *NLRB v. Financial Institution Employees of America (Seattle First)*, 475 U.S. 192, 199 (1986), noted the traditional elements of the due process safeguards: (1) sufficient notice of the election, (2) an adequate opportunity for voters to discuss the election choices, and (3) reasonable precautions to maintain ballot secrecy. The case law has also dealt with the question whether only union members or all unit employees must be provided an opportunity to vote. Since the Union did not make such a distinction in the voting process, the only issue respecting who was allowed to vote is the argument of the Respondent that the Union's voter eligibility list was out of date. Again it is appropriate to discuss these elements separately.

(1) Notice of the Election

Mr. Meraz testified to the leafleting of the workplace and the mailings as described earlier. The Respondent argues that his testimony respecting handballing was secondhand and procedural. The characterization is correct but in the absence of any contrary evidence and his credible recitation, I find the record sufficient to support his assertions as to the described handbilling and mailings.

The Respondent further notes, both as to the notice mailing and the means used to identify voters, that the Union used a list of unit member names and addresses that was generated by the Respondent for the NLRB November 2004 election. Thus, Respondent argues the list was seriously out of date and should not have been used to notify unit employees concerning meetings for the September 2005 affiliation consideration. I do not find this argument persuasive for two reasons. First, the Respondent should not be allowed to benefit from its own wrongdoing. The record clearly demonstrates the Union's repeated attempts to

obtain from the Respondent an updated list of unit members' names and addresses which list was never provided the Union by the Respondent.

Separately, more importantly and independently sufficient standing alone, however, is the handbilling means the Union used to notify unit employees of all its meetings including the meetings in which affiliation was considered, discussed and voted upon. Even with out any mailing, I would find that unit employees received fair notification of the meetings and what was to take place at them. Having found that the handbills were sufficient along, I further find that the leafleting, in conjunction with the mailings, was sufficient for notice of the meetings at which the affiliation was considered and the votes taken.

(2) An Adequate Opportunity for Voters to Discuss Election Choices

The Respondent argues that the affiliation agreement was not printed and distributed to all attending individuals. While true, it is also true that employees were told they could have a copy of the affiliation agreement on request and there were sufficient copies in Spanish and English present during the meeting to supply all who requested a copy. There was no evidence that employees were discouraged from requesting a copy.

Considering the entire process, discussed earlier, I find that there was clearly an adequate opportunity for voters to discuss the election choices at the meetings prior to the vote and that the Board's requirements in these regards were easily met.

(3) Reasonable Precautions to Maintain Ballot Secrecy

Other than the voter eligibility list issue discussed immediately below, there was no contention that the balloting process: (1) the issuance of ballots, (2) the procedures for casting the ballots and (3) the procedures for tallying the ballots, was other than fair, regular and secret. Based on the credited testimony of Mr. Meraz and the absence of evidence or argument to the contrary, I find that reasonable precautions were taken by the Union to maintain ballot secrecy.

(4) Were Unit Members Provided an Opportunity to Vote?

The Respondent found surprising and inconceivable the testimony of Mr. Meraz that, using the essentially year old unit employee list of names to limit the class of voters, apparently no employee not on that out of date list attempted to vote. There were in consequence no challenged votes which would evidence an attempt to vote by a unit employee not on the list. From this the Respondent argues that unit employees hired after the list was prepared must have been denied an opportunity to vote and therefore the vote did not meet minimum due process standards.

The Respondent is correct that if a significant portion of a bargaining unit were to be arbitrarily denied the opportunity to vote in an affiliation election, the election would not meet minimum due process standards. It is critical to note however that the question under consideration here is a denial of an opportunity to vote not the fact that some employees may not have voted. Further, as will each element of the due process analysis, the burden of proving such a failure is on the Respondent.

The record contains no evidence that any unit employee, not on the eligibility list or of more recent hire, complained of the voting process or complained that he or she did not have notice of the elections or was prevented from voting because he or she was not on the eligibility

list. The Respondent called no witnesses let alone unit employee witnesses at the hearing. The sole basis of the Respondent's argument is that there were no challenged ballots which ought to have been expected given the voting procedures in place if post eligibility list hired unit employees had attempted to vote.

The absence of challenges is in such a setting arguably improbable. I do not find it sufficient however where as here there was no testimony or other record evidence which suggested that unit employees were denied a chance to vote. While one might speculate that perhaps voters not on the list who showed their employee photo identification badges somehow voted without challenge, such speculation is again without record support. Mr. Meraz testified credibly respecting the process.

The Board in *CPS Chemical Company, Inc*., 324 NLRB 1018 (1997) discussed the approach to affiliation labor organization continuity. It quoted with approval at 1020 the judge in *Insulfab Plastics* 274 NLRB 817:

> Since the participants in the election did not object to the manner in which the vote was taken, the Respondent is in a poor position to do so now simply because it does not like the way the vote turned out. The Union was under no obligation arising out of statute or regulation to conduct its affiliation vote in a manner deemed suitable by the Respondent. The fact that it did not act in strict conformity with the procedures required for a representation election and chose instead to conduct its business more informally in accordance with the traditions of New England town meeting democracy is no basis for post hoc faultfinding. While flying the flag of ``due process,'' the Respondent should bear in mind that one element of fundamental fairness is that the majority should rule and that its stated wishes should be accorded full weight. In question here is not free employee choice but whether petty obstructionism should be allowed to nullify that choice.[17]

[17]274 NLRB at 823.

In my earlier analysis of the issue of notice to unit employees of the election, I found that the Union's normal pre-meeting leafleting and handbilling provided sufficient proper notice to all unit employees of the meetings and the election. That finding of sufficient notice specifically included in the class of unit employees who received sufficient notice the more recently hired employees who would not have been listed on the out of date eligibility list. I further find here that the challenge procedure described earlier removed any arguable infirmities in the election process that may have existed by use of the out of date election eligibility list.[11] The challenge process, as in NLRB elections, preserves votes cast by individuals not on official eligibility lists. The fact that there were no challenges in the instant election does not fatally undermine these findings. The Respondent's arguments to the contrary are rejected.

I find therefore based on the record as a whole, that the Union's use of the most recent unit employee list it was able to obtain from the Respondent, in conjunction with the requirement that voters show their Respondent prepared employee photo identification badges, and further in conjunction with a challenge procedure that allowed anyone who wished to vote to have their ballots preserved and considered, irrespective of their name appearing on the eligibility list,

[11] As noted supra, the Respondent is hard put in an equitable or fairness argument of the type involved here to blame the Union for failing to use a newer employee list when the record clearly establishes that the Respondent had been asked for such a list – a list the Act requires employers to provide the labor organizations that represent their employees – and had never been given such a list.

easily meets the due process standard that adequate notice of the election and an opportunity to vote was provided. On this record I find the precautions described above were reasonable to maintain ballot integrity and secrecy as well as the opportunity to vote.

(5) Summary Respecting Due Process

I have found supra that the affiliation vote at issue herein took place: (1) after sufficient notice to the voters, (2) after a sufficient opportunity for the voters to discuss the election choices, (3) with reasonable precautions to maintain ballot secrecy and (4) that unit employees were provided a fair opportunity to cast a ballot in the election. The burden as noted, supra, is on the Respondent to show the election process did not meet Board minimum standards of due process. The Respondent did not do so.

Given all the above, I do not find any basis to support a finding that other than reasonable and effective steps to protect the integrity of the voting process took place on this record. I specifically find the procedures subscribed earlier respecting the balloting met the Boards due process minimums. I find the process of consideration, discussion, voting and tallying of ballots was fair and regular.

b. Substantial Continuity between the Pre and Post Affiliation Representative

(1) The Argument of the Parties

The parties disagreed respecting the degrees of difference between the Union in its pre- and post-affiliation status. These different views in turn caused the Respondent and the General Counsel to cite different Board cases as on point herein, and to argue in turn that the cases cited by the opposition were distinguishable. This was fairly to be expected since it is not the state of the law that is in true disagreement herein, but rather the application of that law to the facts of the instant case.

The General Counsel, with the joinder of the Charging Party, cited the Board's decisions in *Minn-Dak*, 311 NLRB 942 (1993) and *Mike Basil Chevrolet*, 331 NLRB 1044 (2000). In those cases the Board found in considering the totality of circumstances that there was continuity in the structure, operation and governance of the relevant bargaining representative. The Respondent focuses on two cases:[12] *Western Commercial Transport*, 288 NLRB 214 (1988) and *Garlock Equip. Co*., 288 NLRB 247 (1988). In those two cases the Board found that comparing the pre- and post-affiliation bargaining representatives there was a sufficiently dramatic change in the identity of the bargaining representative so that the change presented a question concerning representation.

The Respondent attacks the cases cited by the General Counsel as distinguishable on their facts. Thus, the Respondent argues that the post- affiliation Union must for the first time obtain various approvals from the District Lodge and the International that simply did not apply when it was a free-standing, independent, labor organization in the pre-affiliation period. Further, the post-affiliation Union, argues the Respondent, for the first time is obligated to set significant dues requirements and its officers such as Mr. Meraz, cannot hold various offices within the Machinists until they have obtained at least one year of tenure.

[12] The Respondent also cites the analysis of the General Counsel's Office of Advice in certain cases. The General Counsel correctly notes on brief that such cases are not precedent, but are more akin to advocate's argument.

The General Counsel challenges the cases cited by the Respondent because they involve different factual contexts. Thus, *Western Commercial Transport* involved the merger of a small independent entity into a pre-existing local with thousands of members, the effect of which was to subsume its independence and identity within the much larger whole. *Garlock*, the government argues, involved a situation where a small independent entity was absorbed into an already established local union and the bargaining representative identity and authority was passed on to the larger District Lodge with its more remote governance.

(2) Analysis

As discussed supra, an employer must continue to bargain with a labor organization which represents its employees when that entity affiliates with another labor organization unless the resulting changes were sufficiently dramatic to alter the identity of the labor organization such that an entirely different union has been substituted. *CPS Chemical Co., Inc*. 324 NLRB 1018, 1020 (1997). The Board in *CPS* reviewed the correct approach to take in affiliation cases:

> Initially, we note the Board's observations in *Sullivan Bros. Printers*:
>
> [M]ost affiliations or mergers would change a union's organizational structure to some extent, but clearly such natural and foreseeable consequences would not automatically raise a question concerning representation. *Action Automotive*, 284 NLRB 251, 254 (1987). As the Court in [*NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986)] recognized, change is the natural consequence of ordinary, valid reasons for affiliations and mergers, such as increased financial support and bargaining power. *Seattle-First*, 475 U.S. at 199 fn. 5. In sum, as we have stated, ``[t]he notion that an organization somehow loses its identity and becomes transformed . . . because it acquires more clout and becomes better able to do its job is an absurdity and one which flies squarely in the face of a clearly stated congressional objective. . . .'' *Insulfab*, 274 NLRB at 823. [19]
>
> [19] 317 NLRB at 562-563.
>
> Consequently, rather than adopting a mechanistic approach and using a strict checklist, the Board analyzes the totality of circumstances in order to give paramount effect to the employees' desires. [20]
>
> [20] Id. at 563 (citations omitted).

In evaluating the transition in controversy herein several factors must be kept in mind. First, the Union did not merge with but rather affiliated with another labor organization. Thus the Union as a separate body operating with separate leadership was to an important extent preserved. Such affiliation is to be contrasted with a merger at the local level of two or more locals in which the members of the original locals are no longer distinct but are rather blended within the new larger local and are no longer governed separately. Second, the Union has retained and not assigned its bargaining rights in the affiliation process: the collective-bargaining representative remains the same and that status was not transferred to another entity or sub-division within the affiliation.

Further, and importantly, the Union in its pre-affiliation condition herein was overtly in an interim state. Thus explicitly, its election procedures were in abeyance for a period of years. And critically, the payment of dues as a condition of membership and the amount of such mandatory dues had been considered and any decision deferred until a collective-bargaining

agreement was entered into[13] – an event that did not come to pass. The here and now of the Union's governance as well as other aspects of actual conditions as opposed to theoretical or perspective control must be kept in mind. Distant events and theoretical possibilities, such as the Internationals intervention in strike determinations,[14] must be discounted.

The post-affiliation Union is also clearly in an interim state. This was so both in its transitional period of adjustment to and ultimate conformance with the Machinists constitutional requirements and, second, in the fact that the Union still has not entered into a collective bargaining agreement with the Respondent. Thus the affiliated Union still does not require members to pay dues and will not do so until a contract has been entered into.[15] The affiliation agreement also allowed prior Union membership – which was not dues payment dependent during the periods at issue, to count as Machinist membership to fulfill eligibility requirements.

Considering these factors, much of the Respondents argument against the continuity of the Union must be heavily discounted. Thus, where the Respondent argues that the affiliation requirements on the Local made revolutionary changes in its dues structure and made dues mandatory, this is simply not as yet so. Where the Respondent argues that the membership of the Local is effectively disenfranchised from any role in the Union requiring a period of membership in the Machinists, that is simply not so given the Machinist membership credit given for Union membership.

The transitional periods are an important part of an adjustment process in an affiliation and may not be simply disregarded. It is inappropriate simply to take the per capita dues requirements of the Machinists and apply them to the affiliation when there is an explicit, written, 10-year adjustment period involved. I find highly relevant both the explicit adjustments and flexibilities in the affiliation agreement which was signed by the International President and thus qualifies under the International constitution as an authorized affiliation agreement which may create variances with the otherwise mandatory provisions of the International constitution. I also find that the flexibilities provided by Mr. Beno orally on behalf of the Machinists and the District Counsel are also highly relevant. When these matters are considered in the light indicated, the force of the General Counsel's argument that there is continuity in the governance and operation of the Union in its pre- and post-affiliation operations is greatly magnified.

Considering all the above, I find that the Union is not a different or changed entity under the affiliation agreement. In reaching this conclusion I discount much of the argument of the Respondent regarding future or theoretical controls over the Local by the District Lodge and or the International which may arise by operation of the new governing documents described supra. At the real, practical, level, things are in fact very much as they were with the Union. The cases cited and the language quoted supra makes it clear that affiliation often imposes a superstructure where none existed before, without destroying representational continuity. That

[13] Mr. Meraz testified he told the members there would be no mandatory dues: "[u]ntil such time that we negotiated a contract, where we would, as the group would determine what the dues would be and they would be incorporated in that contract.

[14] The record suggests that no Local Lodge strike determination has been overruled by the International within the 30 years experience and memory of Beno.

[15] The affiliation agreement was not the sole basis for the relationship between the Union and the Machinists. Thus Mr. Beno represented to Meraz that he had the authority to make interim adjustments in the Union's obligations and did so, for example, in not requiring membership dues until a contract was reached. Other terms, such as a 10 year adjustment period to allow the Union to match required per capita payments, were explicitly part of the written agreement.

is true here. Here, as in the cases cited, the changes inherent in the affiliation and the greater financial resources of the affiliated entity did not produce a change inconsistent with continuity of representation. Considering the totality of circumstances, the post- affiliation Union is clearly not a different labor organization let alone a dramatically different representative that in was pre-affiliation.

2. The General Counsel's Additional Theory of Violation

As noted supra, the General Counsel also argues that "current law" which she argues requires an evaluation of both due process and continuity of representation "should be changed" to eliminate due process evaluation. The Respondent disagrees.

Having found the current requirement for due process has been met herein, it is not necessary to address the General Counsel's argument. However, since the counsel for the General Counsel explicitly agued she seeks a change in Board law, the more direct approach is simply to assert the longstanding limitation on administrative law judges in unfair labor practice cases. Judges apply Board law as it exists they do not change or reverse Board doctrine. The General Counsel therefore must go to the Board with her arguments in these regards.

3. Summary and Conclusions

I have found that the Union entered into its affiliation with the District Lodge and the International after putting the question to unit employees in a manner that fully met the Board's requirements for due process. Further, I have found that the Union preserved a substantial continuity between its pre and post affiliation states. I have found in considering the totality of those circumstances that there was continuity in the structure, operation and governance of the Union as bargaining representative of unit employees.

There is no dispute that the pre- affiliation Union was the certified representative of unit employees. Given that there was no loss of that representative status in the affiliation process, I further find the Union remained and remains the exclusive representative of unit employees for purposes of collective bargaining.

There being no dispute that the Respondent withdrew recognition of the Union on and at all times after September 30, 2005, and has at all times since refused to meet and bargain and to provide relevant and necessary information, i.e. the names and addresses of unit employees, to the Union, it follows that this conduct violated Section 8(a)(5) and (1) of the Act. I so find, sustaining the allegations of the complaint in all particulars.

Remedy

Having found that the Respondent violated the Act as set forth above, I shall order it to cease and desist there from and post remedial Board notices. Further, I shall order the Respondent to rescind its withdrawal of recognition of the Union as the exclusive representative of unit employees and affirmatively recognize and offer to meet and bargain with the Union respecting a collective bargaining agreement covering those employees. Further, I shall direct the Respondent to provide the Union with a current list of the names and addresses of unit employees.

The Union was certified in Case 32-RC-5286 as the exclusive representative of unit employees on November 14, 2004. The Respondent wrongfully withdrew recognition of the Union on September 30, 2005, and thereafter at least to the time of the hearing continued to

withhold such recognition. The General Counsel with the concurrence of the Charging Party seek an extension of the certification year, the normal period during which a labor organization is irrebuttably presumed to enjoy the support of a majority of unit employees citing *Mar-Jac Poultry*, 136 NLRB 785 (1962). The General Counsel seeks a 6-month extension of the period citing *Dominguez Valley Hospital, Inc*., 287 NLRB 149, 151 (1987); *Van Dorn Plastic Machinery*, Co., 300 NLRB 278 (1990); and *Colofor, Inc*., 282 NLRB 1173 (1987), for the proposition that such a period is appropriate when the unions relationship to the employees it represents has been disrupted during the certification year by the employers wrongdoings. The Respondent opposes any extension and urges a maximum of a two month extension. The cases the Respondent cites in support of its position, *Nansemond Convalescent Center, Inc*., 255 NLRB 563, 567 (1981), and *Haymarket Bookbinders*, 183 NLRB 121 (1970), provide extensions of six months or longer.

The Board on April 26, 2006, issued a decision in *Mercy, Inc. d/b/a American Medical Response,* 346 NLRB No. 88 (April 26, 2006). In that case with various other factors involved, the Board shortened an administrative law judges extension of a certification year by adding only 3 months rather than the judge directed 12 months to the period holding there was no evidence that more than 2 months of the certification year bargaining period was wasted by employer misconduct.

I do not find that case requires a shorter extension period that that sought by the General Counsel. Here I find it is necessary to provide a 6 month extension because the Respondent's conduct involved denying to its employees that the affiliated Union was the same Union as had been elected by the unit employees less than a year before, coupled with a withdrawal of recognition. The Union once recognition occurs will have to in effect reorganize the unit and reinvolve the employees in the bargaining process. That was not the case in *Mercy*. Here the Respondent's misconduct has made at least six months of certification year recognition necessary in essence to bring the Union back up to speed in the mind's eye of the unit and to gain their support and feedback on the proper position to take in resumed bargaining. The Union's organizational inertia and support among unit employees was diminished, the identity of the Union denied and denigrated. In my view, six months is clearly a minimum appropriate extension in established case law unchanged by *Mercy*.

During the trial herein, the United States District Court issued its Order in *Reichard v. Foster Poultry Farms*, 1:06-CV-0238 OWW-LJO (E.D, Cal) (April 28, 2006). That Order held that it would issue an appropriate order directing the Respondent to recognize and bargain with the Union respecting the unit employees. The Respondent on brief argues such an order will make unnecessary any certification year extension. The Charging Party in oral argument argued that such conditional bargaining as may take place under such an injunction is irrelevant to the issue of the extension of the certification year because it is not "real" bargaining.

The Court's Order in evidence is an order only. The intended injunction had not issued as of the time the record was closed herein. The record does not indicate that any bargaining has or will take place. In such an uncertain, prospective posture, I find all argument on the perspective consequences of such injunction directed bargaining on the issue of certification year extension is not yet ripe. Such matters, as with all other matters that take place after the close of the record must be considered either by the Board on proper motion or at the compliance stage of these proceedings.

Based on the record as a whole and the Board cases cited by the parties I find and conclude that it is appropriate to extend the certification year in this case by six months. In the event face-to-face bargaining commences and the requested information is supplied to the

Union subsequent to this decision, appropriate arguments respecting the effect of such actions on the directed 6-months extension of the certification year may be raised in the compliance stage of these proceedings.

The Charging Party in its oral argument also sought extraordinary remedies based on the Respondent's conduct. Thus the Charging Party seeks an order providing that the notice be read by the Respondent's agents to unit employees and providing special access to the unit employees by the Charging Party's agents at the workplace. I do not find the Respondent's conduct as found in violation of the Act herein supports such extraordinary remedies under current Board law. I therefore decline to direct them.

Conclusions of Law

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

3. The Charging Party represents the Respondent's employees in the following unit, which is appropriate for bargaining within the meaning of Section 9 of the Act:

> All full-time and regular part-time employees employed by the Respondent at its 900 Davis Street, Livingston, California facility including maintenance, production, and evisceration employees, rendering department employees, deli plant employees, and Northern California Distribution Center (NCDC) employees; Northern Complex Hive Haul employees located at 8301 Sycamore Avenue, Livingston, California, including catchers/forklift drivers, truck drivers and welders, excluding all outside sanitation employees, quality control employees, truck stop mechanics, clerical employees, Southern Complex Live Haul employees, guards and supervisors as defined in the Act.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of the Union as the exclusive representative of unit employees on or about September 30, 2005 and at all times thereafter failing and refusing to meet and bargain with the Union or provide it with a current list of unit employees names, and addresses.

5. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

ORDER

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.[16]

The Respondent, Foster Poultry Farms, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

:

(a) Withdrawing recognition of the Charging Party as the representative of the employees in the unit described above.

(b) Failing and refusing to meet and bargain with the Union respecting those employees at a time when the Charging Party was irrebuttably supported by a majority of unit employees.

(c) Failing and refusing to provide the Union with a requested current list of the names and addresses of unit employees, which list is necessary for the Union to represent the unit.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Recognize the Charging Party as the exclusive representative of the employees in the unit described above.

(b) Meet and bargain with the Charging Party concerning a collective-bargaining agreement covering unit employees and, if an agreement is reached, embody the agreement in a signed contract.

(c) Provide the Union with a current list of unit employees' names and addresses, and provide such lists in future in a timely manner upon the Union's request.

(d) Within 14 days after service by the Region, post copies of the attached Notice at its Livingston, California facility set forth in the Appendix[17]. Copies of the notice, on forms provided by the Regional Director for Region 32, in English, Spanish, Punjabi and Portuguese, and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to

[16] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

[17] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

employees are customarily posted in each of the facilities where unit employees are employed. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the Livingston facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time after September 30, 2005.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: May 23, 2006

ca

Clifford H. Anderson
Administrative Law Judge

JD(SF)-26-06
Livingston, CA

APPENDIX

NOTICE TO MEMBERS
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

FEDERAL LAW GIVES EMPLOYEES THE RIGHT TO

Form, join or assist a union
Chose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Chose not to engage in any of these protected activities

After a hearing at which we appeared and presented evidence and argument, the National Labor Relations Board has found that we violated the National Labor Relations Act when we withdrew recognition of the League of Independent Workers of San Joaquin Valley, Local Lodge 2005, affiliated with International Association of Machinists and Aerospace Workers, District Lodge 190, AFL-CIO, as the exclusive representative of our employees in the bargaining unit set forth below.

The National Labor Relations Board has required that we post this notice and abide by its terms.

Accordingly, we give our employees the following assurances.

WE WILL NOT refuse to recognize and bargain in good faith with the League of Independent Workers of San Joaquin Valley, Local Lodge 2005, affiliated with International Association of Machinists and Aerospace Workers, District Lodge 190, AFL-CIO by withdrawing recognition of them as the representative of our employees in the following unit:

All full-time and regular part-time employees employed by the Respondent at its 900 Davis Street, Livingston, California facility including maintenance, production, and evisceration employees, rendering department employees, deli plant employees, and Northern California Distribution Center (NCDC) employees; Northern Complex Hive Haul employees located at 8301 Sycamore Avenue, Livingston, California, including catchers/forklift drivers, truck drivers and welders, excluding all outside sanitation employees, quality control employees, truck stop mechanics, clerical employees, Southern Complex Live Haul employees, guards and supervisors as defined in the Act.

WE WILL recognize and bargain with the League of Independent Workers of San Joaquin Valley, Local Lodge 2005, affiliated with International Association of Machinists and Aerospace Workers, District Lodge 190, AFL-CIO as the exclusive representative of the employees in the unit described above and, if an agreement is reached, embody the agreement in a signed contract.

WE WILL provide the Union with a current list of the names and addresses of unit employees and will promptly provide such lists upon request in future.

JD(SF)-26-06
Livingston, CA

WE WILL recognize and bargain with the League of Independent Workers of San Joaquin Valley, Local Lodge 2005, affiliated with International Association of Machinists and Aerospace Workers, District Lodge 190, AFL-CIO on resumption of face-to-face bargaining in good faith and for 6 months thereafter as if the initial year of certification had been extended for that period.

WE WILL NOT in any like or related manner violate the National Labor Relations Act.

Foster Poultry Farms

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC DOCUMENTS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above.

JD(SF)-26-06
Livingston, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

FOSTER POULTRY FARMS
The Respondent

and **Case 32-CA-22292-1**

LEAGUE OF INDEPENDENT WORKERS
OF THE SAN JOAQUIN VALLEY, LOCAL LODGE 2005
affiliated with the INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE WORKERS,
DISTRICT LODGE 190, AFL-CIO
The Charging Party

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